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PATENT APPLICATION

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE HONORABLE BOARD OF PATENT APPEALS AND INTERFERENCES

In re the Application of

Patrick CACERES et al.

Application No.: 10/026,629

Examiner: T. DICUS

Filed: December 27, 2001

Docket No.: 102549.01

For: COOLING ARTICLE INVOLVING EVAPORATION OF WATER FROM A
POLYMER ABSORBENT

REPLY BRIEF

Appeal from Group 1774

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I. STATUS OF CLAIMS

Claims 1-5, 7-18 and 20-25 are on appeal.

Claims 1-5, 7-18 and 20-25 are pending.

No claims are allowed.

Claims 1-5, 7-18 and 20-25 are rejected.

Claims 6 and 19 are canceled.



II. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL

The following grounds of rejection are presented for review, as they have been modified by the new grounds of rejection in the Examiner's Answer:

- 1) Claims 1-5, 7-18 and 20-22 are rejected under 35 U.S.C. §103(a) over U.S. Patent No. 5,669,894 to Goldman ("Goldman") in view of U.S. Patent No. 6,075,177 to Bahia ("Bahia").
- 2) Claims 13, and 23-25 are rejected under 35 U.S.C. §103(a) over U.S. Patent No. 4,897,297 to Zafiroglu ("Zafiroglu").
- 3) Claims 1-3, 7-9, 11, 14-15, 17 and 20-21 are rejected under 35 U.S.C. §103(a) over Zafiroglu in view of Goldman.

III. ARGUMENT

A. Basis for This Reply Brief

As described herein, the Examiner's Answer contains a new ground of rejection. See Examiner's Answer at pages 2-3, item (6). In accordance with 37 C.F.R. §41.39(b)(2), Applicants request that the appeal be maintained, and submit this Reply Brief in compliance with 37 C.F.R. §41.39(b)(2) and 41.41.

Applicants thank the Examiner for the indication that the previous rejection of claims 1, 3, 7, 9 and 21 over Zafiroglu has been withdrawn. However, Applicants note that the rejection of claims 13 and 23-25 over Zafiroglu has been maintained, and that the rejection of claims over Zafiroglu in view of Goldman has been amended to include claims 1, 3, 7, 9 and 21.

The following remarks are directed to the new grounds of rejection and the new points of argument raised in the Examiner's Answer dated February 10, 2005, and should be considered in conjunction with Applicants' arguments in the Appeal Brief.

B. Claims 1-5, 7-18 and 20-22 Would Not Have Been Obvious Over Goldman in View of Bahia

Claims 1-5, 7-18 and 20 are rejected under 35 U.S.C. §103(a) over Goldman in view of Bahia. This rejection remained unchanged in the Examiner's Answer. The following additional comments are provided in response to the Examiner's arguments in the Examiner's Answer.

1. Claims 1-5, 7-12, 14-18 and 20-22 - The References Do Not Teach or Suggest the Excess Amount of Polymer in the Bag

Independent claims 1 and 14 each recite that "the amount of polymer particles enclosed in the bag is in excess compared to the theoretical amount that would be just required to fill up the bag when they are in the full swollen state." At pages 11-12 and 13-14

of the Examiner's Answer, the Examiner argues that this limitation is "a result effective variable and as such, an optimizable feature" of the cited references. Applicants disagree.

a. The References Do Not Teach the Limitation

First, the Examiner has nowhere shown where Goldman and/or Bahia teach or suggest that the amount of polymer particles enclosed in the bag is a result effective variable. That is, neither Goldman nor Bahia teach or suggest that adjusting the amount of polymer particles in the bag has any effect, such that including an amount in excess compared to the theoretical amount that would be just required to fill up the bag when they are in the full swollen state would provide any different results, such that the amount could or should be optimized. In order to be considered a result effective variable, the Examiner must show that there is a result to be effected, such that optimization of the variable effects that result.

In the present case, Applicants have demonstrated that different and unexpected results are obtained when an amount of particles is used that is greater than the theoretical amount that would be just required to fill up the bag when they are in the full swollen state. As a result of the excess amount of particles, when the article is wetted with water, the particles absorb water and swell. However, because an excess amount of polymer particles are present in the envelope, and because of the restricted internal volume of the envelope (or bag), some of the polymer particles cannot swell completely. As a result, these non-fully-swollen particles, which are generally located next to the envelope walls, are capable of absorbing trace amounts of liquid, such as water, moisture or sweat, penetrating into the bag through the envelope. The results is an improved article for keeping the envelope dry.

These results would not be possible if the envelope did not contain an excess amount of particles. If the bag contained less than an excess amount of polymer particles, then all of the contained particles would absorb water or liquid until they were fully swollen. Once fully

swollen, the particles could not absorb additional water or liquid that penetrates into the bag through the envelope, and thus the article would not keep the envelope dry.

Accordingly, the amount of polymer particles contained in the envelope is not a mere result effective variable. If less than an excess amount is used, versus greater than an excess amount, then different results are obtained. Goldman and Bahia do not teach or suggest the different results obtained by the claimed invention, and thus do not teach or suggest "optimizing" the amount of polymer particles present in the envelope to practice the claimed invention.

b. The Limitation Would Not Have Been Obvious From Mere Optimization

The Examiner attempts to overcome the above arguments by asserting that "[o]ne would desire to optimize the [amount of] particles, maximizing the absorbent polymer within the envelope depending upon the desired size of the envelope." See, for example, page 8, lines 1-3 of the Examiner's Answer. Likewise, the Examiner argues that "discovering an optimum value of a result effective variable involves only routine skill in the art." See, for example, page 11, last two lines of the Examiner's Answer. However, even such unsupported optimization would still not have led to the claimed invention.

The Examiner's position appears to be that it would have been obvious to increase the amount or number of polymer particles, if a larger envelope was used. However, such increase in the number of polymer particles to account for a larger envelope, would not have led one of ordinary skill in the art to the claimed invention, where an excess amount of polymer particles is enclosed in the bag compared to the theoretical amount that would be just required to fill up the bag (or envelope) when they are in the full swollen state.

At most, one of ordinary skill in the art may have been motivated to increase the amount of polymer particles to ensure that a larger sized envelope will remain filled when the

particles are in the swollen state. However, such optimization would look only at the volume of the envelope, the volume of the fully swollen particles, and what amount of fully swollen particles would fit in the envelope. Nowhere do the cited references teach or suggest that the amount of polymer particles should be in excess, such that not all of the polymer particles can be fully swollen. The asserted optimization would at most lead only to the theoretical amount of polymer particles that would be just required to fill up the envelope when they are in the full swollen state -- but no more.

Furthermore, selecting an excess amount of the polymer particles, as claimed, is not mere optimization of a result effective variable. As described above and in the Appeal Brief, Applicants obtain different results, not mere optimum results, from the claimed invention. Nowhere do the cited references teach or suggest that the different results obtained in the claimed invention could be achieved by increasing the amount of polymer particles in the bag to be in excess of the theoretical amount that would be just required to fill up the bag when they are in the full swollen state, as claimed.

For this additional reason, the claimed invention would not have been obvious over the cited references.

2. Claim 13 - The References Do Not Teach or Suggest the Claimed Method for Relieving Pain

Independent claim 13 specifically recites "A method for relieving pain from a sore part of an individual's body with a cooling article," comprising steps of wetting polymer particles with water through an envelope during a sufficient time to swell them into a gel mass filling up said bag, and applying the article on a sore part of the individual's body maintaining an inner wall in close contact thereon while allowing water vapor desorbed from said particles to escape through an opposed outer wall of said envelope. However, such a method is nowhere taught or suggested by the cited references. In fact, the Examiner has

admitted this deficiency of the cited references in the Examiner's Answer, but has nevertheless maintained the rejection.

In the Appeal Brief, Applicants argued that Goldman is directed to an absorbent member useful in the containment of body fluids such as urine, and Bahia discloses a wound dressing made of absorbent fibers that is intended to be applied on a wound to absorb fluids. Applicants concluded that neither method teaches or suggests the instant claimed method of relieving pain from a sore part of an individual's body with a cooling article.

In the Examiner's Answer, the Examiner has expressly admitted Applicants' arguments, but has refused to withdraw the rejection. For example, at page 15, lines 4-12 of the Examiner's Answer, the Examiner acknowledges Applicants' argument, and then states that "Zafiroglu was used to teach this method." The Examiner does not explain how Goldman and Bahia, the references cited in this particular rejection, would have rendered obvious the claimed method.

Further, at page 16, lines 5-6, the Examiner expressly states that "Goldman and Bahia were not used to teach the method of relieving pain." Nevertheless, at page 3, last two lines, the Examiner retains claim 13 among the claims rejected over Goldman and Bahia.

Accordingly, for at least the reasons presented by Applicants -- and admitted by the Examiner -- the claimed invention of independent claim 13 would not have been obvious over Goldman in view of Bahia. Reconsideration and withdrawal of the rejection are respectfully requested.

C. Claims 13 and 23-25 Would Not Have Been Obvious Over Zafiroglu

Claims 13 and 23-25 are rejected as having been obvious over Zafiroglu. This rejection was modified in the Examiner's Answer, by deleting the rejection of claims 1, 3, 7, 9, and 21. The following complete argument against the rejection is thus provided, which argument also includes Applicants' responses to the Examiner's Answer.

The Examiner argues that Zafiroglu, like Goldman discussed above, discloses all of the limitations of independent claim 13, and the specified dependent claims. Applicants respectfully disagree.

1. Claims 13 and 25

Independent claim 13 defines a method for relieving pain from a sore part of an individual's body with a cooling article comprising a polymer absorbent enclosed within a bag delimited by a collapsible envelope having non-watertight walls, wherein said polymer absorbent is in particulate form wherein each particle comprises a core of less cross-linked polymer sequences for retaining absorbed water and a shell of more cross-linked polymer sequences for retarding diffusion of water from a particle to another during desorption of absorbed water. The method comprises: wetting said polymer particles with water through said envelope during a sufficient time to swell them into a gel mass filling up said bag, and applying said article on said sore part of the individual's body maintaining an inner wall in close contact thereon while allowing water vapor desorbed from said particles to escape through an opposed outer wall of said envelope. Claim 25 depends from claim 13. Such a method is also nowhere taught or suggested by the cited reference.

In contrast to the claimed invention, Zafiroglu is directed to a hot or wet compress having two outer layers, at least one of which is an elastic, water-permeable fabric. Abstract. The article can be used as a medical bandage, to treat burns, as a wet compress, for wrapping cut tree trunks, for beauty care, and the like. Col. 2, lines 18-22. As with Goldman and Bahia, above, the Examiner has likewise not established a *prima facie* case of obviousness of the claimed invention based on Zafiroglu.

a. Zafiroglu Does Not Teach the Claimed Core-Shell Structure

According to claim 13, the polymer absorbent is in particulate form wherein each particle comprises a core of less cross-linked polymer sequences and a shell of more cross-

linked polymer sequences. The present inventors discovered that such a specific core-shell structure, having a highly cross-linked outer layer shell, forms an expandable lattice that facilitates motion of the particles within the bag, but avoids the problem of the swollen particles forming a hard gel mass. Zafiroglu does not teach or suggest such a core-shell structure.

As a result of the claimed core-shell structure, the particles move freely within the bag, flowing over and around one another. As a result of this free flow within the bag, the particles are better able to distribute themselves within the bag to provide improved water absorption by the particles. This in turn results in a more homogeneous distribution of the cold effect on the surface of the bag.

In the rejection, the Examiner merely states that "the article [of Zafiroglu] is filled within with super-absorbent polymeric particulate materials of a hydrogel which absorbs liquids ... such description is equivalent to Appellant's core-shell polymer particles ..." See Examiner's Answer at page 7, lines 8-11. However, the Examiner nowhere alleges, much less substantiates, that the materials of Zafiroglu are core-shell particles as specifically required in the claim. Because this limitation is not taught or suggest by Zafiroglu, Zafiroglu would not have rendered obvious the claimed invention.

In contrast, Zafiroglu teaches polymer particles that do not have a core-shell structure. The polymer particles of Zafiroglu are simply dispersed with a solid diluent, which can be wood pulp and synthetic polyethylene pulp. See Zafiroglu at col. 3, lines 8-24. In this mixture, the polymer particles form only 5-30% of the filling material, with the pulp mixture forming the remainder. Col. 3, lines 8-12. Zafiroglu describes that the diluent pulp filling material "prevents packing of the hydrocolloidal material and ensures that all of the hydrocolloidal material is available to absorb water." Col. 4, lines 9-12.

The solution taught by Zafiroglu is thus different from that of the claimed invention. While Zafiroglu teaches use of only a small percentage of a superabsorbent polymer in a high percentage of solid diluent, the claimed invention requires the use of a polymer absorbent that is in particulate form having a core of less cross-linked polymer sequences and a shell of more cross-linked polymer sequences, without a required solid diluent. Not only does Zafiroglu not teach or suggest the claimed core-shell structure of the polymer particles, but Zafiroglu instead teaches specifically different superabsorbent particles dispersed in a solid diluent.

Even in the Examiner's Answer, the Examiner has not addressed how or where Zafiroglu teaches the claimed core-shell structure of the polymer particles. Instead, the Examiner focuses only on attempting to argue that Zafiroglu's filler would function the same as the claimed polymer particles, i.e., to absorb liquid. However, even if the materials did function the same, that would not have rendered obvious use of the claimed core-shell structure of the polymer particles, and that limitation cannot be ignored.

Zafiroglu thus does not teach or suggest the claimed invention.

b. Zafiroglu Does Not Teach the Claimed Method

The present claimed invention is based in part on the discovery that the specific core-shell structure of the polymer particles confer unexpectedly improved properties to the article. In particular, the polymer particles confer to the article in which they are contained, after it is wetted with water, a high and long-lasting cooling capability when it is applied to the skin. The claimed invention provides a high thermal inertia and low heat losses, presumably because the highly cross-linked outer layer of the particles only allow water in the form of vapor to escape from the particle cores, and by slowing water circulation from one particle to another.

Zafiroglu fails to teach or suggest the claimed method, or the benefits provided thereby. Zafiroglu discloses an absorbent member that can be used as a wet compress, but does not describe the method for relieving pain with a cooling article of the claimed invention.

According to the methods of Zafiroglu, the disclosed article when used as a wet compress is applied to an application site, and provides action in relation to the liquid used to wet the article. Thus, for example, the Example in Zafiroglu describes a cooling effect, but only when the article is wetted with ice water. As shown in the Example, even that cooling effect decreases over time as the ice water heats up. The Example demonstrates that the cooling effect of Zafiroglu depends upon the water used to wet the article -- if the water is no longer iced or cold, then little or no cooling effect is provided.

In contrast, the claimed invention requires that the article is first wetted with water through the envelope during a sufficient time to swell the polymer particles into a gel mass filling up the bag, and then applying the article on a sore part of the individual's body maintaining an inner wall in close contact thereon while allowing water vapor desorbed from said particles to escape through an opposed outer wall of said envelope. The cooling effect of the claimed invention is provided by allowing the water vapor that is desorbed from the polymer particles to escape through an opposed outer wall of said envelope, while absorbing liquid generated on the application site.

Furthermore, the high and long-lasting cooling effect provided by the claimed method is attributed to the specifically claimed core-shell structure of the polymer particles, which as described above is not taught or suggested by Zafiroglu. The core-shell structure provides a water absorption-desorption mechanism that affects heat transfer from the applied surface, and provides an extended cooling effect. The claimed method does not rely solely upon the temperature of the water used to wet the polymer particles, to provide a cooling effect. In

contrast, Zafiroglu's mixture of a low percentage of polymer particles and a high percentage of solid diluent provides a cooling effect attributed only to the temperature of the water; as the water warms up, the cooling effect is lost. The claimed core-shell structure confers an improved cooling efficiency to the method, which is neither taught nor suggested by Zafiroglu.

The claimed method thus provides a cooling effect through water absorption and desorption, rather than through simply the presence of ice water.

c. Conclusion

Accordingly, Applicants submit that the cited reference to Zafiroglu does not teach or suggest the claimed invention. The reference does not teach or suggest all of the claim limitations, and does not provide any motivation for one of ordinary skill in the art to have combined the reference to practice the claimed invention.

Accordingly, the claimed invention of claim 13 would not have been obvious over Zafiroglu. Reconsideration and withdrawal of the rejection are respectfully requested.

2. Claims 23 and 24

Claim 23 depends from claim 13, and thus includes all of its limitations, and thus is patentable over Zafiroglu for all of the reasons described above. Claim 23 further specifies that the amount of polymer particles enclosed in the bag is in excess compared to the theoretical amount that would be just required to fill up the bag when they are in the full swollen state. Claim 24 depends from claim 23. Claims 23 and 24 are further patentable over Zafiroglu.

Zafiroglu fails to teach or suggest at least the limitation regarding the excess amount of polymer particles. Zafiroglu merely discloses that its polymer particles (which as described above are different form the claimed core-shell polymer particles) are present in an amount of only form 5-30% of the filling material, with the pulp mixture solid diluent forming the

remainder. Col. 3, lines 8-12. Although Zafiroglu teaches that the article contains swellable particles, the reference is silent with respect to the amount of swellable particles in relation to the volume of the bag containing the particles in their swollen state. However, because Zafiroglu requires a substantial amount of solid diluent, Zafiroglu arguably teaches against the instant claim limitation. The reference nowhere teaches or suggests that an excess of particles should be included, such that the bag cannot allow all of the particles to achieve a fully swollen state. The reference also fails to teach or suggest any benefits that could be provided thereby.

In response, as with Goldman and Bahia discussed above, the Examiner argues at page 16 of the Examiner's Answer, that this limitation is "a result effective variable and as such, an optimizable feature" of the cited references. Applicants disagree.

The Examiner has nowhere shown where Zafiroglu teaches or suggests that the amount of polymer particles enclosed in the bag is a result effective variable. That is, Zafiroglu does not teach or suggest that adjusting the amount of polymer particles in the bag has any effect, such that including an amount in excess compared to the theoretical amount that would be just required to fill up the bag when they are in the full swollen state would provide any different results, such that the amount could or should be optimized. In order to be considered a result effective variable, the Examiner must show that there is a result to be effected, such that optimization of the variable effects that result.

In the present case, Applicants have demonstrated that different and unexpected results are obtained when an amount of particles is used that is greater than the theoretical amount that would be just required to fill up the bag when they are in the full swollen state. As a result of the excess amount of particles, when the article is wetted with water, the particles absorb water and swell. However, because an excess amount of polymer particles are present in the envelope, and because of the restricted internal volume of the envelope (or bag), some of the polymer particles cannot swell completely. As a result, these non-fully-

swollen particles, which are generally located next to the envelope walls, are capable of absorbing trace amounts of liquid, such as water, moisture or sweat, penetrating into the bag through the envelope. The results is an improved article for keeping the envelope dry.

These results would not be possible if the envelope did not contain an excess amount of particles. If the bag contained less than an excess amount of polymer particles, then all of the contained particles would absorb water or liquid until they were fully swollen. Once fully swollen, the particles could not absorb additional water or liquid that penetrates into the bag through the envelope, and thus the article would not keep the envelope dry.

Accordingly, the amount of polymer particles contained in the envelope is not a mere result effective variable. If less than an excess amount is used, versus greater than an excess amount, then different results are obtained. Zafiroglu does not teach or suggest the different results obtained by the claimed invention, and thus does not teach or suggest "optimizing" the amount of polymer particles present in the envelope to practice the claimed invention. This is particularly true with respect to Zafiroglu, which requires that the article includes a substantial amount of solid diluent. Zafiroglu nowhere teaches how or why an excess amount of polymer particles should be used, and how the amount of polymer particles should be adjusted with respect to the required presence of the solid diluent.

Zafiroglu thus does not teach or suggest, and in fact teaches way from, the instant claim limitation. Zafiroglu does not teach or suggest any reason to modify the disclosed article to provide such an excess of polymer particles, as claimed.

Accordingly, the claimed invention of claims 23 and 24 would not have been obvious over Zafiroglu. Reconsideration and withdrawal of the rejection are respectfully requested.

D. Claims 1-3, 7-9, 11, 14-15, 17 and 20-21 Would Not Have Been Obvious Over Zafiroglu in View of Goldman

This rejection was modified in the Examiner's Answer, by adding claims 1, 3, 7, 9 and 21. The following complete argument against the rejection is thus provided, which argument also includes Applicants' responses to the Examiner's Answer.

Independent claim 1 is discussed above. Independent claim 14, in relevant part, contains the same limitations as claim 1. The Examiner argues that Zafiroglu discloses all of the limitations of the rejected claims, and that Goldman discloses the specific nonwoven thermoplastic fibers of the claims. Applicants respectfully disagree.

As described, claim 1 specifies that the article comprises a polymer absorbent enclosed within a bag delimited by a collapsible envelope having non-watertight walls, wherein said polymer absorbent is in particulate form wherein each particle comprises a core of less cross-linked polymer sequences for retaining absorbed water and a shell of more cross-linked polymer sequences for retarding diffusion of water from a particle to another during desorption of absorbed water. Claim 1 also requires that the amount of polymer particles enclosed in the bag is in excess compared to the theoretical amount that would be just required to fill up the bag when they are in the full swollen state. Such articles are nowhere taught or suggested by the cited reference.

In contrast to the claimed invention, Zafiroglu is directed to a hot or wet compress having two outer layers, at least one of which is an elastic, water-permeable fabric. Abstract. The article can be used as a medical bandage, to treat burns, as a wet compress, for wrapping cut tree trunks, for beauty care, and the like. Col. 2, lines 18-22.

As with Goldman and Bahia, above, the Examiner has likewise not established a *prima facie* case of obviousness of the claimed invention based on Zafiroglu, even if combined with Goldman.

For example, Zafiroglu fails to teach or suggest the limitation in claims 1 and 14 that the amount of polymer particles enclosed in the bag is in excess compared to that which would be just required to fill up the bag when they are in the full swollen state. As described above, this limitation indicates that the bag contains a sufficient amount of particles such that the volume limitation of the bag will constrain all of the particles from achieving the full swollen state, because there is insufficient room in the bag to allow all of the particles to achieve the full swollen state. As a result, when the article is wetted with water, the particles absorb water and swell. However, because of the excess amount of polymer particles, and of the restricted internal volume of the envelope (or bag), some of the polymer particles cannot swell completely.

Further, as also discussed above, this limitation is not a mere result effective variable that would be optimized by one of ordinary skill in the art. The amount of polymer particles in the claimed invention provides a different result than would be provided if no excess of polymer particles was provided. Thus, mere optimization would not have rendered obvious the claimed invention.

Zafiroglu, like Goldman and Bahia, fails to teach or suggest at least the limitation regarding the excess amount of polymer particles. Nor do the references teach or suggest any reason to modify the disclosed articles to provide such an excess of polymer particles. Although Zafiroglu teaches that the article contains swellable particles, Zafiroglu is silent with respect to the amount of swellable particles in relation to the volume of the bag containing the particles. Zafiroglu nowhere teaches or suggests that an excess of particles should be included, such that the bag cannot allow all of the particles to achieve a fully swollen state. Nor does Zafiroglu teach or suggest any benefits that could be provided thereby.

Goldman is cited in the rejection for its asserted disclosure of the specific nonwoven thermoplastic fibers of the claims. However, regardless of this disclosure, any combination of

Zafiroglu and Goldman still would not have rendered obvious the claimed invention. The combination of references still would not have taught or suggested at least the claimed excess amount of polymer particles.

Zafiroglu and Goldman both fail to teach or suggest at least the limitation regarding the excess amount of polymer particles. Nor do the references teach or suggest any reason to modify the disclosed articles to provide such an excess of polymer particles. Although Zafiroglu and Goldman teach that the respective articles contain swellable particles, the references are silent with respect to the amount of swellable particles in relation to the volume of the bag containing the particles. The references nowhere teach or suggest that an excess of particles should be included, such that the bag cannot allow all of the particles to achieve a fully swollen state. The references also fail to teach or suggest any benefits that could be provided thereby.

Accordingly, one of ordinary skill in the art based on the cited references would not have been motivated to practice the claimed invention.

IV. CONCLUSION

It is respectfully submitted that the remaining points of argument set forth in the Examiner's Answer were fully addressed in Appellant's Appeal Brief. For the reasons set forth herein and in the Appeal Brief, it is respectfully requested that the rejections of the claims under 35 U.S.C. §103(a) be reversed.

Respectfully submitted,



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